IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 367 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAVIRAJ PRAFUL THACKER

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 367 of 2003

MR Y N Oza, Sr.Counsel with Mr.MM TIRMIZI for Petitioner No. 1

Mr S S Patel, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 09/10/2003

ORAL JUDGEMENT

This is a revision application filed by the petitioner abovenamed under section 397 read with section 401 of the Code of Criminal Procedure, 1973 (for short,

'the Code') in order to challenge an order dated 28.7.2003 recorded by the learned Additional City Sessions Judge, Court No.18 in Sessions Case No.99/2003 and 100/2003 directing that the present petitioner be joined as co-accused in the aforesaid Sessions Case and also directing that the case be proceeded against him in accordance with law.

2. It appears from the record that the aforesaid Sessions Cases were being conducted before the above Court and the present petitioner not being an accused was not required to face trial in the said Sessions Case. The said Sessions cases relate to the offence punishable under section 302, 323, 324, 502, 326 of IPC and such other offence.

3. It appears from the record that during the course of trial, charge was framed against the concerned accused persons and the prosecution has examined about 22 witnesses. In the meantime, the learned Judge who was trying the said Sessions Case found that though the name of the present petitioner was disclosed as an accused person in the FIR being Cr.I.458/2001 on 16.10.2001 in respect of the offence in question which allegedly took place on 15.10.2001, at 12 midnight, criminal proceedings under section 169 of the Code have not been taken in respect of the petitioner and, therefore, having regard to the material on record, the petitioner be joined as co-accused and he may be tried along with other accused persons.

4. He was therefore pleased to direct that the petitioner be added as a co-accused and he be tried with other accused. Feeling aggrieved by the said order dated 28.7.2003 of the learned Addl.City Sessions Judge, the petitioner has preferred this revision application before this Court.

5. It has been contended here that the trial court did not have any evidence against the petitioner and therefore, the trial court was not justified in joining the present petitioner as co-accused. Therefore, the order joining the petitioner as co-accused is illegal on the face of record. Therefore, the present revision be allowed and the said order of the trial court directing the present petitioner to be joined as co-accused, be set aside. On receiving the revision application, rule was issued. Thereafter, in response to the service of rule, Mr S S Patel, learned APP has appeared on behalf of the State. I have heard Mr Y N Oza, learned Sr. Counsel appearing with Mr M M Tirmizi, learned Advocate for the

petitioner and Mr S S Patel, learned APP for the State.

6. Learned Sr.Counsel for the petitioner has argued at length that though the name of the petitioner was found in FIR as accused No.4, the petitioner was never arrested and therefore, ultimately he was never charge-sheeted before the trial court. That at the end of investigation by the Police Investigating Officer, the said officer was not required to submit any report under section 169 of the Code before the Court concerned. That as there was non-submission of report of the Police Investigating Officer under section 169 of the Code, the trial court directed that the petitioner be joined as co-accused. It has also been contended by Mr Y N Oza that there is no evidence or material on record to connect the petitioner with the crime, even prima facie, and hence the petitioner could not be joined as co-accused.

7. So far as the second contention is concerned, it is very clear that the prosecution has examined as many as 22 witnesses. The petitioner has submitted copies of depositions of those witnesses with the petition and on a reference of the said depositions, it can be gathered that the name of the petitioner has not been disclosed as one of the accused persons involved in the offence during the course of the aforesaid depositions. In other words, the name of the petitioner has not been disclosed by any of the witnesses referred to hereinabove. There is no serious dispute about this aspect.

8. However, the learned APP appearing for the State has drawn my attention to certain materials on record. We can refer to the evidence of PW 5-Kiran Maganbhai Patel, Exh.21. It seems that this witness has been treated hostile. Learned APP, incharge of the prosecution before the trial court has cross-examined this witness. It is not much in dispute that this witness was confronted with his earlier statement recorded by the police investigating agency under section 161 of the Code. There, he has stated that it is not true that he has stated to the police that he along with other accused persons had intervened to save the deceased and at that time, the present petitioner, the son of Prafull Thakkar had inflicted a dharia blow on his head and, therefore, he had become unconscious. Then we can refer to the evidence of Investigating Police Officer, Kerman Khushed Maisurwala, PW 18 at Exh.62. At page no.105, he has proved the above contradiction.

9. Then we can turn to the evidence of Dr.

Rajendrakumar Joshi, PW 7 at Exh.38, who has proved in his evidence at page no.5 the aforesaid injury sustained by the said witness Kiran Maganbhai Patel. In other words, the say of the witness in his statement before police about injuries sustained by him has been proved by the evidence of this witness at page no.5. During the course of cross examination of the Investigating Police Officer at page no.119, para 46, it has been disclosed that the names of the petitioner and his father Prafull Thakkar were disclosed during the course of statements of witness but they were not arrested and they have not been cited as eye witnesses. This witness also admitted before the trial court during the course of cross examination at page no.119 in para 46 that it was disclosed during the course of the statements of witnesses that the present petitioner and his father had caused injuries to some extent.

10. It is required to be considered that whatever disclosed during the course of investigation cannot come in evidence through the deposition of the Investigating Police Officer. These facts are required to be proved independently. In fact, no question could be put to the I.O. as to what was gathered during the course of investigation. On this aspect of the case, we can refer to a decision reported in 1988 Cri.L.J. 705. In view of the above decision it was not open to the trial court to permit the aforesaid question being put during the cross-examination of the I.O. and, therefore, the answer received during the course of cross-examination of the said witness would not be admsisible in evidence. Therefore, it cannot be treated to be an evidence. Even otherwise, at the best it may be said that the name of the petitioner was disclosed at the stage of investigation and nothing more.

11. Now we can turn to page no.127 which is the evidence of PW 22, Pruthvisinh Solanki, Exh.102. In para 3 of his evidence, this witness has stated that he had gone to Mount Abu under the order of Police Inspector Maisurwala for the investigation in respect of the present petitioner and he did investigate the same with respect to the petitioner. But this is not an evidence against the petitioner nor is even a material against the petitioner because the witness has given evidence before the trial court and no material involving the petitioner appears to have been collected and produced by him. It is not the case of the prosecution that the said material is in the pocket of the prosecution which can be produced hereafter. In other words, it appears that there is no material or evidence with the prosecution even at this

stage coming from the custody of this witness so as to involve the present petitioner in the offence in question. The above is the only material which is said to be against the petitioner. At page no.108 in the evidence of PW 18 Mr Maisurwala at Exh.62 some questions were put by the court itself. There this witness has disclosed in para 28 that he had recorded statements of injured Kiranbhai Patel and Vinod Arjanbhai and the name of the petitioner was disclosed from the said statement and he did make an entry in the case dairy. That thereafter a statement of the petitioner was recorded on 21.11.2001. In para 29 of his evidence, the witness has given an answer to the Court that he had not gone to the residence of the petitioner for investigation but he had deputed his subordinates for the said purpose and an information was derived that the petitioner was staying in Indrajit society in Thakarnagar area. At page no.109 this witness has replied to the Court that he never met the present petitioner. That he had contacted the parents of the petitioner Dr. Prafull Thakkar and Krishna Thakkar but he could not get any information about the petitioner and he did not go to the place of the petitioner again. He has further stated that from the FIR of Arjanbhai, he could gather that the petitioner was not present at the relevant point of time and he also could gather that involvement of the petitioner was found to be doubtful in view of the contradictory statements made by the witnesses Vinod Arjanbhai and Kiranbhai Patel. He has further stated that he had entrusted some investigation to his PSI, Sola, who had produced materials before him showing that the petitioner was present elsewhere on the date on which the offence is said to have been committed. He has further stated that the said facts have been noted by him in the case dairy. He has also made it clear that he had never arrested the present petitioner and no report under section 169 of the Code was submitted with respect to the present petitioner. This shows that the Investigating Police Officer had found at the relevant point of time that the petitioner was not involved in the offence. Now so far as the oral evidence is concerned, the prosecution has examined eye witness in the form of -

a. PW.1 Vinodbhai Arjanbhai Patel, Exh.17
b. PW 2 Bhavesh Vinodbhai Gandhi Exh.18
c. PW 3 Arjanbhai Virjibhai Patel Exh.19,
   who was shown as eye witness as well as the complainant
d. PW 4 Chandresh D Patel, Exh.20 being injured eye witness
e. PW 5 Kiran Maganbhai Patel, exh.21 - injured eye

witness

Other witnesses are either Doctors or panch witnesses or police officers. This shows that the prosecution has examined as many as 5 eye witnesses and at least four of them were injured eye witnesses. All the five eye witnesses have been declared hostile by the prosecution and they have not supported the case of the prosecution. Therefore, from their evidence the involvement of the petitioner has not come on record. Then the learned APP has referred to the FIR filed by Arjanbhai, PW 3 - Exh.19 in order to show prima facie involvement of the petitioner.

12. It is required to be considered that the informant has already been examined. He has been treated hostile by the prosecution. He has not supported the case of the prosecution. He has not stated anything about the involvement of the petitioner in the offence in question. Therefore, when the informant has been tested before the court concerned and when the FIR filed and produced before the court concerned, the contents of the FIR were not required to be considered by the trial court as the contents thereof could not be said to have been proved and unless the contents thereof have been proved, it cannot be said that the petitioner was involved in the offence in question. The FIR cannot be used as substantive evidence. At the same time, it can be used as corroborative evidence. However, when the informant has not proved the contents of the FIR and when there is no other material on record to prove the contents of the FIR, then the contents of FIR cannot be used against the petitioner for any other purpose. It is more so, when the prosecution is not in a position to prove the contents of FIR.

13. In support of his argument, learned APP has relied upon certain decisions also. In the case of Ram Niwas v. State of U.P., reported in 1990 Cr.L.J. 460, the scope of section 319 of the Code has been discussed. There it has been observed that when the applicant was not shown as accused in charge-sheet though his name has been mentioned in FIR and during the course of the trial, evidence of witness showed his complicity, then, the applicant can be summoned for being tried together with the charge-sheeted accused. It is further stated that the statements of witness can be termed as evidence under section 319 of the Code. In the present case, we find that the said stage has already gone and the witnesses have already been examined. When the witnesses have been examined and when they have been treated hostile by the

prosecution, then the prosecution cannot fall back on the statements of the witnesses recorded during the course of investigation under section 161 of the Code.

13.1. In the case of Ranjit v. State of Punjab, reported in AIR 1998 SC 3148, Hon'ble the Supreme Court has observed in para 19 as follows:

> "Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order the only other stage when the Court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the Court to wait until the entire evidence is collected for exercising the said powers."

In the present case, evidence has already been recorded and, therefore, the stage suggested in the above judgment has already gone.

13.2. In the case of Rakesh v. State of Haryana, reported in AIR 2001 SC 2521, Hon'ble the Supreme Court has made observations in para 13 and the relevant and important observations may be reproduced for ready reference as follows:

> "13. xxx xxx
> Word "Evidence" occurring in sub-section is used in comprehensive and broad sense which would also include the material collected by the Investigating Officer and the material or evidence which comes before the Court and from which the Court can prima facie conclude that person not arraigned before it is involved in the commission of the crime".

On the strength of the aforesaid observation, the learned APP has submitted that the statements of witnesses including FIR can be treated to be evidence for the purpose of section 319 of the Code and if that evidence involves the petitioner, then the petitioner can be added as co-accused persons. It is required to be seen that the statements of witnesses or even the FIR may be treated as evidence for the purpose of section 319 of the Code. However, when the witnesses have already been

examined and when they have been confronted with their statements and when the witnesses have been declared hostile by the prosecution, it would not be open to the prosecution to revert back to their statements recorded under section 161 of the Code during the course of investigation. Almost similar principle was enunciated in a judgment of this Court in the case of Amratlal Devdanbhai Soni v. Director of Revenue Intelligence, 1997 (3) GLR 2019. There the learned Judge of this Court (Coram: Hon'ble Mr Justice N N Mathur) has clearly observed that power under section 319 of the said Code can be exercised by Sessions Court even without recording evidence. There the Sessions Court had exercised power under section 319 of the Code just before framing of charge and, therefore, it was found that it was a proper exercise of power and jurisdiction under section 319 of the Code. Again the point is that when the evidence has been recorded the prosecution cannot require the court to go back to the statements of witnesses recorded under section 161 of the Code during the course of investigation or on the contents of the FIR filed by a particular witness whose evidence has been recorded and who has not proved the contents of FIR and who has been treated as hostile by the prosecution.

13.3. In the case of Gunaram Tanti v.State of Assam, 1983 Cr.L.J. 289, Hon'ble Gauhati High Court had taken a different view stating that that reliance on police statement cannot be placed for invoking power and jurisdiction under section 319 of the Code. There it has been observed that the word "evidence" in section 319 of the Code read with other provisions of the section means statement of witness recorded by the Court and the same would not include police statement.

13.4. The case of Municipal Corporation v. Ram Kishan, reported in AIR 1983 SC 67 was based on a different set of facts. However, there it has been observed that section 319 of the Code gives ample powers to any court to take cognizance and add any person not being accused before it and trying along with other accused. However, it has also been mentioned therein that this is really an extraordinary power which is conferred on the court and should be used sparingly and only when compelling reasons exist for taking cognizance against other persons.

13.5. In Arun Dube v. State of M.P., reported in 1991 Cri.L.J. 840, again the term "evidence" used in section 319 of the Code was interpreted. It was observed that a Committing Court is fully competent to proceed against any person other than accused. It was also observed that

the term "evidence" as used in section 319 of the Codes does not necessarily mean only such evidence as constitutes legal and admissible evidence at the trial, but it includes the evidence collected during investigation, the documents relied on by the prosecution for the purpose of proving the guilt of the accused at the stage of the trial and on consideration whereof the Committing Court makes up its mind to commit or not to commit the case to the Court of Session. Even otherwise the statements of witnesses recorded under section 161 of the Code would constitute 'documents'."

13.6. Almost a similar view was taken in the case of Dalip Singh v. state of Rajasthan reported in 1989 Cri.L.J. 600.

14. However, in my reading of section 319 of the Code, even if the statements of witnesses recorded under section 161 of the said Code and the FIR filed under section 154 of the said Code can be treated to be evidence then also when the witnesses have been examined, when the witnesses have not supported the prosecution case during the course of evidence, no material has come out from those witnesses, then in that case, leaving aside the evidence of the witnesses, the prosecution cannot require the Court to go back to the statements of witnesses recorded under section 161 of the Code or to the contents of FIR filed under section 154 of the Code. Therefore, in my considered opinion, when the evidence has already been recorded and concluded and when the petitioner's name has not been disclosed to any extent, it would not be open to the Court or to the prosecution to include the present petitioner as co-accused and the petitioner could not be joined as co-accused. In other words, the order of the trial court directing the petitioner to be joined as co-accused, is illegal on the face of record and, therefore, it is required to be quashed and set aside and I am of the opinion that during the course of trial till the evidence has been concluded and even the I.O. has also been examined, till then, no involvement of the petitioner has come on record. Therefore, in absence of any material placed before the trial court, it was not open to the trial court to include the petitioner as co-accused. In above view of the matter, the order of the trial court is ex-facie illegal and requires to be set aside. In that view of the matter, this Criminal Revision Application is allowed. The impugned order passed by the trial court dated 28.7.2003 impleading the present petitioner as co-accused and directing issuance of non-bailable warrant against him is set aside.

Rule is made absolute accordingly. D.S. permitted.

[D P Buch, J.]

msp